Supreme Court, U.S.
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No. 08-700

IN THE
Supreme Court of the United States

ALAN MACKERLEY,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VOLUME I

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441

Counsel for Petitioner

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. _____
Non-Argument Calendar

D.C. Docket No. 14229-CV-DLG

ALAN MACKERLEY,

Petitioner,

versus

SECRETARY OF THE DEPARTMENT
OF CORRECTIONS,

Respondent.

Appeal from the United States District Court
for the Southern District of Florida

(July 3, 2008)

Before TJOFLAT, ANDERSON and BLACK,
Circuit Judges.

PER CURIAM:

Alan Mackerley ("Mackerley"), a counseled Florida state prisoner, appeals from the denial of his federal habeas petition filed pursuant to 28 U.S.C. § 2254. The district court issued a certificate of appealability for the following issue: whether trial counsel was constitutionally ineffective at Mackerley's pretrial suppression hearing by failing to argue that the state did not demonstrate that it satisfied the necessity requirement of the Florida wiretap statute,

section 934.09(1)(c) of the Florida Statutes. Mackerley argues that because the state failed to meet the necessity requirement, the evidence derived from the wiretap should have been suppressed, which would have led to a different outcome in his trial. For the reasons explained below, we affirm the district court's denial of Mackerley's petition.

I. DISCUSSION

"Whether a criminal defendant has received effective assistance of counsel is a mixed question of fact and law." Conklin v. Schofield, 366 F.3d 1191, 1201 (11th Cir. 2004). Accordingly, we review the district court's findings of historical facts underlying the ineffective assistance of counsel's claim for clear error, and review de novo the court's determination of whether trial counsel's performance was constitutionally deficient. Id. Under 28 U.S.C. § 2254(d), we may not grant habeas relief when a state court has already adjudicated the claim on the merits, unless the state court's interpretation is contrary to or an unreasonable application of clearly established federal law, or involves an unreasonable determination of facts. 28 U.S.C. § 2254(d) (2006). However, when the state court has not ruled on the merits of the claim at issue, deference to the state court decision is not required. David v. Sec'y for the Dep't of Corrs., 341 F. 3d 1310, 1313 (11th Cir. 2003) (holding that deference to the state court decision was not required because the court had not ruled on the merits of defendant's claim). Here, the state court did not address the merits of Mackerley's ineffective assistance of counsel claim, and it is not clear whether the court ruled on the merits of Mackerley's underlying lack of necessity claim.[1] Therefore, we review Mackerley's claim before

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[1] In its order denying post-conviction relief to Mackerley, the state court noted that Mackerley had raised his lack of necessity claim on direct appeal. The appellate court did not address the lack of necessity claim but upheld the wiretap and the

this Court with no deference to the state court decisions. However, the outcome of Mackerley's appeal would be the same even if deference were required, because we find that Mackerley is not entitled to habeas relief.

To demonstrate ineffectiveness of counsel, the petitioner must show both that counsel's performance was objectively unreasonable and that counsel's deficient performance prejudiced the petitioner's case. Kimmelman v. Morrision, 477 U.S. 365, 375, 106 S. Ct. 2574, 2582-83 (1986). When deciding whether counsel's performance was deficient, courts operate under a strong presumption that counsel's conduct was reasonable and that counsel "made all significant decisions in the exercise of reasonable professional judgment." Strickland v. Washington, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 2065-66 (1984). A court may find that counsel's performance was unreasonable only if the petitioner shows "that no competent counsel would have taken the action that his counsel took." Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000).

In this case, law enforcement placed a wiretap on Mackerley's phone, which led them to William Anderson ("Anderson"). Anderson was the state's key witness at trial. Before trial, Mackerley's counsel filed a motion to suppress the evidence obtained through the

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denial of the motion to suppress. The state court ruling on the post-conviction motion held that Mackerley could not re-litigate issues already raised on direct appeal, and rejected the ineffective assistance of counsel claim as an improper attempt at re-litigation. Therefore, the post-conviction court did not rule on the merits of the ineffective assistance of counsel claim. While Mackerley raised the lack of necessity issue before the appellate court, it is not clear that that court adjudicated the merits of that claim. Appellees have not contended on appeal that our review should be impacted by these Florida court decisions.

grounds: lack of probable cause and failure to minimize the recorded conversations. At the hearing on the motion to suppress, the agent who submitted the wiretap affidavit testified that law enforcement would have found Anderson without the wiretap, using traditional investigative techniques. Mackerley argues that this statement demonstrates that the statutory requirement of necessity for a wiretap was not met.[2] Mackerley's counsel did not amend the motion to suppress or otherwise attempt to use the agent's testimony to exclude the wiretap evidence based on lack of necessity. Mackerley contends that the failure to attack the wiretap evidence on these grounds renders his counsel's performance constitutionally deficient.

We cannot agree. Florida courts have stated that the necessity requirement exists "to ensure that wiretap procedures are not routinely used as the initial step in a criminal investigation." See, e.g., Weedon v. State, 425 So. 2d 125, 127 (Fla. Dist. Ct. App. 1982). However, officers seeking a wiretap are not required to exhaust every other investigative technique before seeking authorization. Id. Rather, the officers must show that other techniques have been tried and failed or that such techniques have not been tried but are likely to fail. Daniels v. State, 381 So. 2d 707, 711 (Fla. Dist. Ct. App. 1979). In short, a wiretap is appropriate when the officers can demonstrate "[t]hat wiretapping appears the most reasonable investigative technique under the circumstances to secure other and conclusive

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[2] Section 934.09(c) of the Florida Statues requires that each application for a wiretap includes "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Information obtained through an improper wiretap may not be used in any proceeding. Fla. Stat. Ann. § 934.06 (West 2008).

evidence of criminal involvement." Id. at 711-12. In addition, "courts will not invalidate a wiretap order simply because defense lawyers are able to suggest post factum some investigative technique that might have been used and was not. It is enough if the affidavit explains the prospective or retrospective failure of several investigative techniques that reasonably suggest themselves." Hudson v. State, 368 So. 2d 899, 903 (quoting United States v. Hyde, 574 F. 2d 856, 867 (5th Cir. 1978)).

As these cases make clear, the necessity requirement is met if the applying officers can explain at the time of application why traditional investigative techniques are unlikely to succeed. Whether at a later point in the investigation those officers believe they could have discovered through traditional means the evidence derived from the wiretap is not relevant to the necessity of the wiretap in the first instance. See Daniels, 381 So. 2d at 711. Given this state of the law in Florida, and the affidavit's thorough explanation of why conventional investigative techniques would not work in this case, we cannot find that no competent counsel would have failed to attack the wiretap evidence on necessity grounds. Therefore, we cannot conclude that the performance of Mackerley's counsel was constitutionally deficient. Accordingly, the judgment of the district court is

AFFIRMED.[3]

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[3] Appellant's request for oral argument is DENIED.

IN THE NINETEENTH JUDICIAL CIRCUIT IN
AND FOR MARTIN COUNTY, FLORIDA
CASE NO. 96-1029 CFA
ALAN MACKERLEY,

Movant/Defendant,

v.

STATE OF FLORIDA,

Respondent.
_____/

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The movant/defendant, Alan Mackerley, through undersigned counsel, pursuant to Fla. R. Crim. P. 3.850, has filed a motion for postconviction relief seeking a new trial based upon ineffective assistance of trial counsel. This is the defendant's memorandum of law in support of the motion.

SUMMARY OF CLAIM

The defendant was denied effective assistance of trial counsel in violation of the Sixth Amendment to the Constitution of the United States and article I of the Constitution of the State of Florida. The defendant's trial counsel failed to preserve a meritorious ground for suppression of evidence obtained from a wiretap.

As discussed in detail below, the Florida wiretap statute has a "necessity requirement." Pursuant to this requirement, a wiretap is violative of the statute if the authorities could have obtained the evidence sought through alternative investigatory techniques which

include interviews, surveillance, and pen registers.[4] Where the necessity requirement is violated, suppression of all derivative evidence is required pursuant to the wiretap statute's mandatory exclusionary clause.

In this case, the defendant's trial counsel filed a motion to suppress attacking the wiretap. The motion did not raise a violation of the necessity requirement. At the pretrial suppression hearing, Florida Department of Law Enforcement Agent Driscoll, who executed the affidavit in support of the wiretap application, testified that the critical evidence obtained from the wiretap, namely, William Anderson (who became the prosecution's star witness at the trial), would have been discovered without the wiretap had the authorities continued with their traditional investigatory techniques. However, as Driscoll explained, the authorities abandoned those techniques (namely, a pen register, interviews, and surveillance) in favor of obtaining the wiretap. Despite the agent's concession that the wiretap was not necessary, counsel for the defendant failed to argue that ground for suppression. Subsequently, Anderson offered critical testimony against the defendant at his trial and the defendant was convicted.

Because the violation of the necessity requirement as a ground for suppression was not preserved, Mackerley could not succeed in raising the issue on appeal, although he tried. See *Johnson v. State*, 888 So. 2d 122 (Fla.4th DCA 2004) (defendant's argument that traffic stop was illegal, thereby requiring suppression of seized evidence, could not have been raised on direct appeal because defense

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[4] A pen register is a device attached to a telephone line and identifies all of the telephone numbers dialed on the line. § 934.02(20), Florida Statutes. An order to install a pen register is much easier to obtain than a wiretap. The application for a pen register order need only certify that the information sought is relevant to an ongoing criminal investigation. § 934.32(2).

counsel did not make the argument at suppression hearing).[5] However, trial counsel's failure to present the issue as a ground for suppression is cognizable in a postconviction motion raising ineffective assistance of counsel. *Id.*

As demonstrated below, had Mackerley's trial counsel raised the violation of the necessity requirement, all of the fruits of the wiretap would have been suppressed, which included the testimony of Anderson. Accordingly, Mackerley was severely prejudiced by counsel's failure and is entitled to a new trial without evidence derived from the illegal wiretap.

INTRODUCTION

The record on appeal filed in the defendant's direct appeal, see *Mackerley v. State*, 900 So. 2d 662 (Fla.4th DCA 2005), is adopted in its entirety. The symbol "ST" designates the pages of the 191-page transcript of the pretrial suppression hearing held March 12, 2002 which comprises the supplemental record on appeal. The symbol "T" designates the pages of the trial transcripts contained in Volumes 21-44 of the record on appeal. The symbol "R" designates the balance of the record, Volumes 1-20.

BACKGROUND FACTS

On April 5, 1996, the authorities obtained a court order to install a pen register on Mackerley's home telephone. (R. 593). On April 11, 1996, an affidavit was executed in support of an application to wiretap Mackerley's home telephone. (R. 570-95). The authorities abandoned the pen register when the affidavit in support of the wiretap order was executed. The wiretap order was issued the following day. (R.

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[5] Mackerley attempted to obtain reversal by raising the issue on appeal but the Fourth District did not (and could not) reach the issue because counsel failed to preserve the issue for review. *Johnson, supra.*

636-41). Thereafter, Mackerley was indicted for murder.

Prior to trial, Mackerley's counsel filed a motion to suppress evidence derived from the wiretap order. (R. 364-380). The motion raised the following two grounds: (1) lack of probable cause (R. 370) and (2) failure to minimize (R. 374). An evidentiary hearing was held on the motion to suppress.

At the hearing on the motion to suppress, Agent Driscoll testified that the decision was made to obtain a wiretap at the "very, very early stages" of the investigation. (ST. 52). Driscoll also testified that as a direct result of the wiretap, prosecution witness Anderson was discovered. (ST. 60-61). Agent Driscoll further testified that Anderson would have been discovered through normal investigative techniques had the wiretap not been obtained. That testimony was as follows:

> ***PROSECUTOR: Had you not gone up on the wiretap, would you have done those normal investigative procedures and techniques?***
> ***AGENT DRISCOLL: Yes, of course.***
> ***PROSECUTOR: And would you have inevitably discovered and interviewed Bill Anderson?***
> ***AGENT DRISCOLL: Yes.***
> **PROSECUTOR: Any doubt in your mind about that?**
> **AGENT DRISCOLL: None whatsoever.**

(ST. 57-58).

Despite this unequivocal testimony that Anderson would have been discovered without the wiretap, counsel for the defendant failed to amend the motion to suppress or otherwise preserve the illegality of the wiretap on the ground that the wiretap violated the necessity requirement of the Florida wiretap statute.

The trial judge denied the motion to suppress without stating any reasons. (ST. 87).

ARGUMENT

THE NECESSITY REQUIREMENT OF THE FLORIDA WIRETAP STATUTE WAS VIOLATED.

A wiretap order cannot legally issue under Florida's wiretap statute in the absence of a showing of "necessity." Sections 934.09(1)(c) and (3)(c), Florida Statutes mandate the showing of necessity as follows:

> 934.09 Procedure for Interception of Wire or Oral Communications.
>
> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. *Each application shall include the following information:*
>
> ....
>
> (c) *A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;*
>
> ....
>
> (3) *Upon such application, the judge may enter an ex parte order,* as requested or as modified, *authorizing or approving interception of wire or oral communications* within the territorial jurisdiction of the court in which the judge is sitting *if the judge determines on the basis of the facts submitted by the applicant that:*
>
> ....
>
> (c) *Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;....*

(Emphasis supplied).

This requirement of necessity is imposed as a matter of Federal constitutional law applying the Fourth Amendment's reasonableness requirement to electronic surveillance. See *Berger v. New York*, 388 U.S. 41, 58-60, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967). The necessity requirement ensures that electronic surveillance be resorted to with restraint and only when necessary. See *United States v. Kahn*, 415 U.S. 143, 153 n.12, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974). Wiretapping is not to be routinely employed as an initial step in a criminal investigation. See *United States v. Giordano*, 416 U.S. 505, 515, 94 S.Ct. 1820, 40 L.Ed.2d 341 (1974).

In violation of the above statutory and decisional requirements, the wiretap was employed in this case as an investigative tool at the commencement of the investigation. As noted, Agent Driscoll testified that the wiretap was sought "very, very early" in the stages of the investigation. (ST. 52). A pen register had been installed on Mackerley's home telephone and was not in service more than six days when the wiretap application was made. Prior thereto, in early March of 1996, Mackerley's telephone records had been subpoenaed. (ST. 42-43). However, the authorities did not even attempt to identify or seek to interview any of the potential witnesses revealed by the pen register. Nor did they subpoena any additional telephone or hotel records that would have identified Anderson. (ST. 59).[6]

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[6]Agent Driscoll went on to explain that it was later learned that the telephone records showed calls to a hotel room where Anderson was staying. Agent Driscoll agreed with the prosecutor that without the wiretap, he "would have found out who that person was in that hotel room" because "we would have identified the hotel and gone up there and obtained the records." (ST. 59).

Instead, once the wiretap order was obtained, Agent Driscoll and the authorities halted the normal investigative procedures that would have been as effective in favor of the wiretap.

Agent Driscoll's testimony proves that had the authorities investigated the telephone records prior to the wiretap, they would have discovered and interviewed Anderson. Thus, the authorities did exactly the opposite of what the state and federal wiretap protections require -- they obtained a wiretap order prior to pursuing normal investigatory procedures that would have succeeded. The authorizing judge should have required the authorities to pursue the results of the pen register and other investigative techniques, such as review of the telephone records, surveillance, and interviews prior to seeking a wiretap. A period of six ***weeks*** has been held insufficient for exhaustion of pen register results prior to seeking a wiretap. See *Sutton*, 556 So. 2d at 1213 ("The pen register had only been in place for six weeks when it was discontinued .... Earlier investigations suggested that the Suttons were involved in the importation and sale of illegal drugs, but did not establish an ongoing criminal venture. The authorizing judge should have required the police to renew the pen register or otherwise update the evidence connecting this residence and telephone to the criminal activity."). Here, the pen register was in effect only for a period of six ***days***.

The exhaustion or necessity "requirement is intended to ensure that wiretap procedures are not routinely used as the initial step in a criminal investigation." *State v. Weedon*, 425 So. 2d 125, 126 (Fla.4th DCA 1983). The failure of the authorities to comply with the wiretap statute's necessity requirement is "fatal to the validity of the application" and the "issuing court [is thereby] precluded from issuing an intercept order" because "section 934.09(3)(c) unequivocally requires that a court, before issuing an order, determine on the basis of the facts submitted in the application that normal investigative procedures have been tried and failed or reasonably appeared to be unlikely to succeed if tried or to be too

dangerous." *Copeland v. State*, 435 So. 2d 842, 845 (Fla.2d DCA 1983). An intercept order is therefore invalid where, as in *Copeland*, the application is silent as to whether the authorities tried normal investigative techniques, or where, as in the case at bar, mere boilerplate attempts to downplay the effectiveness of pen registers which have not been in place for even a week. See *Zuppardi v. State*, 367 So. 2d 601, 604 (Fla.1979) ("boilerplate recitation of the difficulties of gathering usable evidence ... is not a sufficient basis for granting a wiretap order ..."; "... the interception of private communications should not be permitted as a routine method of criminal investigation where more conventional techniques may be successfully employed...." *Id.* at 605.). See also *Wilson v. State*, 377 So. 2d 237 (Fla.2d DCA 1979) (supplement to affidavit for application for wiretap invalid for, among other things, failing to state reasons for abandoning routine methods of surveillance in favor of wiretap).

The federal wiretap statute contains the same necessity requirement as Florida's statute. One federal appellate court faced nearly the identical situation presented here. In that case, the court of appeals held as follows:

> With respect to pen registers, the wiretap application claims that these "records only provide evidence that the telephone was used, without showing the identity of the callers or the nature or purpose of those communications." But this is nothing more than a description of the inherent limitations of these devices. A full and complete statement of necessity must specify why, in the particular case at hand, these inherent limitations will be insufficient. As [the defendant] argues, the record shows that pen registers did provide useful information in this case because they revealed numbers of individuals in contact with [the defendant] who had previously been identified....

United States v. Blackmon, 273 F.3d 1204, 1210 (9th Cir.2001). The identical reasoning applies here. Thus, the defendant's rights under the state and federal wiretap protections were violated when the necessity requirement was not met.

DEFENSE COUNSEL FAILED TO PRESERVE THE VIOLATION OF THE NECESSITY REQUIREMENT WHICH WOULD HAVE MANDATED SUPPRESSION

As noted, Mackerley's counsel filed a pretrial motion to suppress evidence derived from the wiretap order. (R. 364-380). However, the motion raised only two grounds: (1) lack of probable cause (R. 370) and (2) failure to minimize (R. 374). The Florida wiretap statute expressly requires the mandatory exclusion of evidence derived from any improper interception.[7]

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[7] § 934.06 provides: "Whenever any wire or oral communication has been intercepted, **no part of the contents of such communication and no evidence derived therefrom may be received in evidence** in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, **if the disclosure of that information would be in violation of this chapter**. The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter."

§ 934.01(2) provides: "In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, **it is necessary for the Legislature** to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and **to**

"This statutory exclusion is **absolute**." *Jackson*, 636 So. 2d at 1374. Thus, had the violation of the necessity requirement been raised by defense counsel, suppression would have been required.

The judicially-crafted exceptions to the exclusionary rule of the Fourth Amendment are not applicable to this statutory exclusionary provision. See *State v. Garcia*, 547 So. 2d 628 (Fla.1989) (the good faith exception to the judicially-crafted fourth amendment exclusionary rule authorized by *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) does NOT apply to the statutorily-mandated exclusionary provision of the Florida wiretap statute). See also *Davis v. State*, 529 So. 2d 732, 735 (Fla.4th DCA 1988), *approved in State* v. *Garcia, supra* ("By setting forth in unequivocal language that the suppression of evidence is the consequence of an illegal wiretap, the Legislature removed from judicial purview, the authority to alter the statutory scheme by creating a good faith exception.") Only the Florida Legislature can promulgate exceptions to the exclusionary provision of the Florida wiretap statute. Thus, the judicially crafted "inevitable discovery" exception to the Fourth Amendment exclusionary rule announced in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984) does not apply for the same reasons. See *State v. Daugherty*, 931 S.W.2d 268 (Tex.Cr.App.1996) (the inevitable discovery exception does not apply to a statutory exclusionary rule).

DEFENSE COUNSEL'S FAILURE TO PRESERVE THE VIOLATION OF THE NECESSITY REQUIREMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL.

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prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."

A defendant in a criminal case is entitled to effective assistance of counsel pursuant to the Sixth Amendment to the Constitution of the United States and article I of the Constitution of the State of Florida. In order to establish ineffective assistance of counsel, the defendant must satisfy the two elements of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S.Ct. at 2064. Second, the defendant must show prejudice, meaning that "there is a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. at 2068 (e.s). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

As the Fourth District held in *Johnson, supra*, a trial counsel's failure to preserve a ground for suppression of evidence constitutes ineffective assistance of counsel. That is precisely what occurred here.

THE LAW OF THE CASE DOCTRINE DOES NOT APPLY

The prosecution might rely upon the doctrine of law of the case by arguing that the Fourth District has ruled against Mackerley on the merits of the violation of the necessity requirement. That argument is without merit. Although Mackerley requested reversal in his direct appeal based upon the violation of the necessity requirement, the doctrine of law of the case does not apply here. The Fourth District did not decide the issue. Indeed, it was the only issue raised by Mackerley that the Fourth District did not address in its opinion. The reason is clear. The Fourth District was barred from considering this ground for suppression because it was not preserved by trial counsel. *Johnson, supra*. See also *Harris v. State*, 826 So. 2d 340 (Fla.2d DCA 2002) (defendant made facially sufficient postconviction claim of ineffective assistance of counsel in asserting that trial counsel failed to seek

suppression and asserting that issue was raised on appeal but not addressed on its merits because of counsel's failure to preserve the error); *Analyte Diagnostics, Inc. v. D'Angelo*, 792 So. 2d 1271, 1272 (Fla.4th DCA 2001) ("The doctrine of the law of the case is applied to issues *actually considered and decided* by a former appeal involving the same case. [citation omitted] Here, however, even though the issue was presented to this court, it was not properly before it as the question had neither been considered nor ruled upon below.").

A NEW TRIAL FURTHERS THE INTERESTS OF JUSTICE

A new trial will not only vindicate the denial of the defendant's constitutional right to effective assistance of counsel, it will further the interests of justice under the specific facts of this case. Lisa Costello entered into a plea agreement with the prosecution. However, she did not testify in the prosecution's case in chief or to rebut Mackerley's testimony that she confessed to him that she and her accomplice, Juan Albelo, were responsible for the murder and disappearance of the victim, Frank Black. Instead, the State relied upon the testimony of Anderson, who was not an eyewitness. He claimed that Mackerley stated that he shot Black through the head in Mackerley's home and blood was everywhere, even on the ceiling. However, there was not one nanogram of blood or other forensic evidence to corroborate Anderson's testimony.

A retrial without the testimony of Anderson will serve the interests of justice. Upon retrial, a jury can hear for the first time the testimony of Costello who, unlike Anderson, has direct knowledge of what happened. Until a jury has the opportunity to weigh Costello's testimony against Mackerley's, there can be no confidence in the correctness of a verdict.

WHEREFORE, the defendant respectfully requests a finding of ineffective assistance of trial counsel and a new trial without the fruits of the illegal wiretap.

Respectfully submitted,

LAW OFFICES OF PAUL MORRIS, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
Florida Bar No. 193769
(305) 670-1441

_____

PAUL MORRIS
Counsel for Alan Mackerley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this memorandum was mailed to Office of the State Attorney, 100 S.E. Ocean Blvd., Stuart, FL 34994, this 20th day of July 2005.

_____

PAUL MORRIS

IN THE NINETEENTH JUDICIAL CIRCUIT IN AND FOR MARTIN COUNTY, FLORIDA

CASE NO. 96-1029 CFA

STATE OF FLORIDA,

v.

ALAN MACKERLEY,

Defendant.
_____/

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF

THIS CAUSE came before the Court in chambers on the Defendant's motion filed July 20, 2005, pursuant to Florida Rule of Criminal Procedure 3.850. The court finds and determines as follows:

The Defendant was convicted of first degree murder and is currently serving a life sentence. The Fourth District Court of Appeal affirmed the Defendant's conviction on April 6, 2005. *See Mackerley v. State*, 900 So. 2d 662 (Fla. 4th DCA 2005). The Defendant now seeks post-conviction relief based on one claim of ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 677 (1984). To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A defendant is entitled to an evidentiary hearing on an ineffective assistance of counsel claim if he specifies facts, not conclusively rebutted by the record, demonstrating that counsel rendered ineffective assistance and that the defendant was prejudiced as a result. *Johnson v. State*, 888 So. 2d 122, 123 (Fla. 4th DCA 2004).

The defendant claims that trial provided ineffective assistance by failing to preserve for appellate review the issue of whether the State's wiretap complied with the statutory requirement of necessity. Section 934.09(1)(c), Florida Statutes, required that an application for authorization of a wiretap include "[a] full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to success if tried or to be too dangerous." Section 934.09(1)(c) is satisfied "if wiretapping appears to be the most reasonable investigative techniques" to secure evidence of criminal activity. *Covello v. State*, 462 So. 2d 1206, 1207 (Fla. 4th DCA 1985) (noting that "it is not necessary that the state show that all possible techniques or alternatives have been exhausted").

The defendant raised the issue of necessity on appeal. (Excerpts from the Defendant's initial brief are attached; *see* pp. 11-12 and 21-26). In its answer brief, the State addressed the merits of the defendant's argument. (Excerpts from the State's answer brief are attached; *see* 31-34). In its written opinion affirming the defendant's conviction, the appellate court concluded, among other things, that "there was probable cause for the wiretap and that the [trial] court did not err in denying the motion to suppress the evidence obtained from it." *Mackerley*, 900 So. 2d at

664. (A copy of the opinion is attached). Rule 3.850 may not be employed by defendants to re-litigate issues raised on direct appeal. *Turner v. Dugger*, 614 So. 2d 1075 (Fla. 1992).

In support of his ineffective assistance claim, the defendant argues that because trial counsel had not preserved the issue for review, the appellate court did not directly address the defendant's necessity argument. As the State correctly notes in its response to the defendant's motion, the appellate court did not "state or even suggest that the necessity claim was not preserved for direct appeal." On the contrary, the defendant's claim was considered and rejected by the Fourth District Court of Appeal when that court held that the trial court did not err when it denied the defendant's motion to suppress. *Mackerley*, 900 So. 2d at 664. The defendant is procedurally barred from re-litigating the issue in his post-conviction motion under the guise of ineffective assistance of counsel. *See Cherry v. State*, 659 So. 2d 1069, 1072 (Fla. 1995); *King v. State*, 597 So. 2d 780, 782 (Fla. 1992).

The Defendant's motion is therefore **DENIED**.

The Defendant has thirty days to appeal.

DONE AND ORDERED in Chambers in Stuart, Martin County, Florida, on November 18, 2005.

_____

LARRY SCHACK
CIRCUIT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-14229-CIV-GRAHAM/LYNCH

ALAN MACKERLEY,

Petitioner,

v.

JAMES R. McDONOUGH,
Florida Department of Corrections,
CHARLIE CRIST,
Attorney General of the State of Florida,

Respondents.
_____/

PETITIONER'S AMENDED MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Alan Mackerley, through undersigned counsel, respectfully files this amended memorandum of law in support of his petition for writ of habeas corpus. The only amendments are the record citations to the petitioner's appendix.

A. STATEMENT OF THE CASE

The petitioner, a state prisoner in Florida, was charged with first degree murder. (App. A). Following a jury trial (App. B), he was found guilty as charged and sentenced to life imprisonment. (App. C). He appealed to the District Court of Appeal of Florida,

Fourth District. (App. D -- 3 briefs). His conviction was affirmed on direct appeal, *Mackerley v. State*, 900 So. 2d 662 (Fla.4th DCA 2005). The petitioner filed in the state trial court a motion seeking postconviction relief based upon ineffective assistance of trial counsel. (App. E). The motion was denied (App. F) and the petitioner appealed. The denial was affirmed without opinion by the state appellate court. *Mackerley v. State*, 930 So. 2d 629 (Fla.4th DCA 2006).

B. TRIAL PROCEEDINGS

Authorities obtained a court order to install a pen register[8] on the petitioner's home telephone in connection with an investigation into a missing person. A few days later, an affidavit was executed by Florida Department of Law Enforcement Agent Driscoll in support of a wiretap application under Florida's wiretap statute, § 934.09, Florida Statutes. (App. G). A wiretap order for the petitioner's home telephone was immediately issued. (App. I). The authorities abandoned the pen register and other traditional investigative techniques (such as interviews and surveillance) in favor of the wiretap. (App. G:570-95; App. H:52; App. I: 636-41). As a direct result of the wiretap, the authorities discovered and interrogated William Anderson. Based upon Anderson's statements,

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[8] A pen register is a device attached to a telephone line and identifies all of the telephone numbers dialed on the line. See § 934.02(20), Florida Statutes. Under Florida law, an order to install a pen register is much easier to obtain than a wiretap. The application for a pen register order need only certify that the information sought is relevant to an ongoing criminal investigation. § 934.32(2).

the petitioner, along with Lisa Costello, were charged with the murder of the missing person, Frank Black. Costello pled guilty to a lesser charge. The petitioner maintained his innocence, alleging that Costello and her cohort were solely responsible for the disappearance of Black (who was never found). The State did not call Costello to testify at the petitioner's trial. Instead, the State relied almost exclusively upon Anderson's uncorroborated testimony that the petitioner made incriminating statements to him.[9] The petitioner testified in his own defense at trial and flatly disputed Anderson's testimony.

Prior to the trial, the petitioner's trial counsel filed a motion to suppress all evidence derived from the wiretap order, which included Anderson's testimony. (App. J). The motion challenged the legality of the wiretap upon only two grounds: lack of probable cause (App. J:7); and failure to minimize. (App. J:11).

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[9] Anderson claimed that the petitioner stated that he shot Black through the head in the petitioner's home and that the petitioner described the scene as horrific -- blood was everywhere, even on the ceiling. However, there was not a nanogram of blood found by the investigators that corroborated Anderson's testimony. Anderson had at least two motives for falsely implicating the petitioner: (1) Anderson learned that his wife had a 10-year affair with the petitioner (App. B: 3263); and (2) Anderson was advised to "cooperate" (*i.e.* curry favor) with the authorities after he told his attorney that he feared criminal prosecution for making false statements to state and federal authorities during the early stages of the investigation of Black's disappearance, feared being a suspect in the disappearance because it was widely known that Anderson hated Black, and feared being charged as an accessory after the fact based upon conversations he had with the petitioner. (App. B:3238-39).

Significantly, the petitioner's trial counsel failed to move to suppress on the ground that the necessity requirement of the wiretap statute was violated. Under Florida law, a wiretap is violative of the necessity requirement if the authorities could have obtained the evidence derived from the wiretap through alternative investigatory techniques such as interviews, surveillance, and pen registers.[10] Where the necessity requirement is violated, suppression of all derivative evidence is required pursuant to the wiretap statute's mandatory exclusionary clause.[11]

An evidentiary hearing was held on the motion to suppress. The only witness at the hearing was Agent Driscoll, who was called by the prosecution. He confirmed that as a direct result of the wiretap, Anderson was discovered. (App. H:60-61). Driscoll further testified that Anderson would have been

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[10] See § 934.09(1)(c). The federal counterpart is 18 U.S.C. § 2518(1)(c).

[11] The Florida wiretap statute expressly requires the mandatory suppression of evidence derived from any improper interception. See § 934.06, Florida Statutes. "This statutory exclusion is **absolute**." *Jackson v. State*, 636 So. 2d 1372, 1374 (Fla.2d DCA 1994), approved *State v. Jackson*, 650 So. 2d 24 (Fla.1995). Similarly, suppression is the remedy for violation of the federal necessity requirement. See *e.g., United States v. Gonzalez, Inc.*, 412 F.3d 1102 (9th Cir.2005). Both the Florida and federal necessity requirements reflect the legislative "'intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications.'" *Bagley v. State*, 397 So. 2d 1036, 1038 (Fla.5th DCA 1981) (quoting *United States v. Giordano*, 416 U.S. 505, 513, 94 S.Ct. 1820, 1827, 40 L.Ed.2d 341 (1974)).

discovered through alternative investigatory techniques had those techniques not been abandoned in favor of the wiretap. In other words, Driscoll unequivocally established that the necessity requirement of the wiretap statute was violated. Driscoll's testimony on this critical issue was as follows:

> **PROSECUTOR: Had you not gone up on the wiretap, would you have done those normal investigative procedures and techniques?**
> **AGENT DRISCOLL: Yes, of course.**
> **PROSECUTOR: And would you have inevitably discovered and interviewed Bill Anderson?**
> **AGENT DRISCOLL: Yes.**
> **PROSECUTOR: Any doubt in your mind about that?**
> **AGENT DRISCOLL: None whatsoever.**

(App. H:57-58).

Despite the clear violation established from Driscoll's testimony, trial counsel for the petitioner failed to raise and preserve the violation of the necessity requirement of the Florida wiretap statute. The trial judge denied the motion to suppress without reasons. (App. H:87). Following a jury trial wherein Anderson testified, the jury deadlocked and a mistrial was declared. Following another jury trial wherein Anderson testified, the petitioner was found guilty as charged.

C. DIRECT APPEAL OF CONVICTION

The petitioner directly appealed to the District Court of Appeal of Florida, Fourth District. The petitioner raised the following three grounds for reversal that had preserved for review by his trial counsel: the erroneous admission of luminol evidence; the absence of probable cause for the wiretap order; and the erroneous admission of prior consistent statements of Anderson. The petitioner also argued that the trial judge should have granted the motion to suppress based upon the violation of the necessity requirement, even though trial counsel failed to preserve that issue for review, and despite the rule that the Fourth District is prohibited from reaching the merits of a challenge to a suppression order on a ground not raised by trial counsel in the motion to suppress. See *Johnson v. State*, 888 So. 2d 122 (Fla.4th DCA 2004). See also *Analyte Diagnostics, Inc. v. D'Angelo*, 792 So. 2d 1271, 1272 (Fla.4th DCA 2001) ("[E]ven though the issue was presented to this court, it was not properly before it as the question had neither been considered nor ruled upon below.").

The Fourth District affirmed the petitioner's conviction and sentence in an opinion that only mentioned the three issues that were preserved for review by the petitioner's trial counsel. The opinion primarily addressed the preserved issue concerning the admissibility of the luminol evidence. *Mackerley*, 900 So. 2d at 662-64. The Fourth District also expressly rejected the other two issues preserved for review, namely, the probable cause challenge to the wiretap order and the preserved challenge to the admissibility

of the prior consistent statements [12] The unpreserved issue -- the violation of the wiretap statute's necessity requirement -- was the only issue not addressed by the Fourth District.

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[12] Concerning the probable cause issue and prior consistent statement issue, the Fourth District held as follows:

> As to the other issues raised by appellant, we conclude that there was probable cause for the wire tap and that the court did not err in denying the motion to suppress the evidence obtained from it. Nor do we find error in allowing testimony as to the prior consistent statements of the state's primary witness.

Mackerley, 900 So. 2d at 664.

D. POSTCONVICTION PROCEEDINGS

The petitioner filed a motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850 alleging that his trial counsel was ineffective for failure to seek suppression based upon the violation of the necessity requirement of the wiretap statute. (App. E). The petitioner argued that as result of trial counsel's failure, the Fourth District could not and did not reach the necessity violation which otherwise would have resulted in reversal and a new trial. The trial judge summarily denied the postconviction motion on the ground that the Fourth District "considered and rejected" the necessity violation. (App. F:3). The petitioner appealed the trial judge's denial. (App. K). The State did not respond to the petitioner's brief and the Fourth District affirmed without an opinion. (App. L).

E. THE PETITIONER EXHAUSTED HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The petitioner exhausted his federal constitutional claim. The Sixth Amendment claim was presented to the state trial court and to the Fourth District Court of Appeal. The only higher court in Florida, the Supreme Court of Florida, does not have jurisdiction to review a per curiam affirmance without opinion. See *Dodi Publishing Co. v. Editorial America*, 385 So. 2d 1369 (Fla.1980).

F. THE STANDARDS UNDER THE AEDPA AND DECISIONAL AUTHORITIES

1.

The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] provides in pertinent part that a state prisoner is entitled to federal habeas corpus relief upon a showing that the state's adjudication of his federal claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States ..." or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d)(1), (2). Also, a decision is "contrary to" federal law if the state court proceedings result in the application of a legal principle different from the governing principle set forth in Supreme Court cases. *Bell v. Cone*, 535 U.S. 685, 122 S.Ct. 1843, 1850, 152 L.Ed.2d 914 (2002).

To succeed on a claim of ineffective assistance of counsel, the petitioner must show both that his counsel's performance was constitutionally deficient and that he was prejudiced by his counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A petitioner satisfies the prejudice element by showing that "there is a reasonably probability that, but for [his] counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Trial counsel's ineffectiveness for failure to properly move to suppress evidence is a ground for habeas corpus relief. See *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). This

rule applies to relief under the AEDPA. See *e.g.*, *Thomas v. Varner*, 428 F.3d 491 (3d Cir.2005) (counsel's failure to object or file motion to suppress in-court identification was not objectively reasonable); *Howard v. Bouchard*, 405 F.3d 459 (6th Cir2005) (trial counsel's failure to move to suppress identifications fell below reasonable professional standards); *Northrop v. Trippett*, 265 F.3d 372 (6th Cir.2001) (trial counsel ineffective in failing to move to suppress drug evidence); *Cossel v. Miller*, 229 F.3d 649 (7th Cir.2000) (counsel ineffective for failing to object to in-court identification of defendant); *Rodriguez v. Young*, 906 F.2d 1153, 1161 (7th Cir.1990) (same as *Cossel*)

In order to obtain relief under *Kimmelman*, a petitioner must prove (1) that counsel's representation fell below an objective standard of reasonableness, (2) that the claim for suppression is meritorious, and (3) that there is a reasonable probability that the verdict would have been different absent the excludable evidence. *Zakrzewski v. McDonough*, ___ F.3d ___, 2006 WL 1911328, *4 (11th Cir. July 13, 2006).

2.

The petitioner established the first element, that counsel's representation fell below an objective standard of reasonableness. The State has never claimed, and no Florida court in the petitioner's proceedings has ever held, that trial counsel's failure to seek suppression based upon the undisputed violation of the necessity requirement constituted reasonable representation. Indeed, in *Jones v. United States*, 224 F.3d 1251 (11th Cir. 2000), the Eleventh Circuit held that a criminal defense attorney's performance fell below the required objective standard of reasonableness where counsel failed to move to suppress wiretap evidence based upon the untimely sealing of the wiretap evidence.

As for the second prong, whether the claim for suppression is meritorious, the State raised two arguments in the petitioner's direct appeal. Neither is meritorious. The State's first argument was that the inevitable discovery doctrine saves the otherwise

invalid wiretap order. That doctrine is a judicially-created exception to the judicially-created Fourth Amendment exclusionary rule. See *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). The exception allows evidence derived from an unconstitutional police action to be admitted if the evidence would ultimately have been discovered by legal means. However, the State's argument was clearly foreclosed by the decision of the Supreme Court of Florida in *State v. Garcia*, 547 So. 2d 628 (Fla.1989), holding that a judicially-crafted exception to the Fourth Amendment exclusionary rule, such as the good faith exception, does not apply to the statutorily-mandated exclusionary provision of the Florida wiretap statute. See also *Davis v. State*, 529 So. 2d 732, 735 (Fla.4th DCA 1988), *approved in State* v. *Garcia, supra* ("By setting forth in unequivocal language that the suppression of evidence is the consequence of an illegal wiretap, the Legislature removed from judicial purview, the authority to alter the statutory scheme by creating a good faith exception.").

The State's second argument similarly attempted to advance another exception to the Florida wiretap statute's exclusionary provision based upon *United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978). In *Ceccolini*, the United States Supreme Court addressed the question whether the scope of the Fourth Amendment exclusionary rule should extend to the testimony of a witness. *Id.* at 279-80, 98 S.Ct. at 1062. After addressing the complex concerns surrounding that question, the Supreme Court announced several factors to be considered in determining when the exclusionary rule should be invoked to suppress live testimony (*e.g.*, whether the witness would have come forward of his own). The *Ceccolini* factors could not apply to the petitioner's case because, as noted in the above discussion of the inevitable discovery exception, the Fourth Amendment exclusionary rule is not at issue. For the same reasons the judicially-created good faith exception and inevitable discovery rule do not apply to the Florida wiretap statute, the *Ceccolini* "exception" would not apply as well.

Additionally, in *Ceccolini*, the Supreme Court noted that its analysis would differ "where the search was conducted by the police for the specific purpose of discovering potential witnesses." *Ceccolini*, 435 U.S. at 277 n.4. That is precisely the reason why the authorities sought the wiretap in this case, namely, to discover witnesses such as Anderson. Accordingly, had the petitioner's trial counsel raised the necessity violation, suppression could not be avoided by application of *Ceccolini*.

Thus, the petitioner satisfies the second prong with a showing of the validity of the ground for suppression that trial counsel failed to raise.

The third prong requires a showing of a reasonable probability that the verdict would have been different absent the excludable evidence. Here, the excludable evidence was the testimony of Anderson. Because Anderson was the key prosecution witness and his testimony was not corroborated by any other witness, or even physical evidence, the third prong is met. See *Huynh v. King*, 95 F.3d 1052, 1058 (11th Cir.1996) (state prisoner is prejudiced as a matter of law if a motion to suppress, not properly presented due to counsel's ineffectiveness, would likely have been granted resulting in the exclusion of evidence critical to the prosecution); *Smith v. Wainwright*, 777 F.2d 609, 616-17 (11th Cir.1985) (counsel's "failure to move to suppress the confessions was *extremely* prejudicial to Smith" because his confessions constituted the primary evidence in the state's case) (emphasis original).

CONCLUSION

Based upon the foregoing, the petitioner respectfully requests that this Court order the State to show cause why relief should not be granted and thereafter grant habeas corpus relief by ordering that the State retry the petitioner or discharge him.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing corrected memorandum was mailed to Melynda L. Melear, the Office of the Attorney General, 1515 North Flagler Drive, Suite 900, West Palm Beach, FL 33401 this _____ day of December, 2006.

Respectfully submitted,

Law Offices of Paul Morris, P.A.
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441
paulappeal@aol.com

/s PAUL MORRIS
Counsel for Petitioner Alan Mackerley

Supreme Court, U.S.
FILED

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No. 08-700

IN THE
Supreme Court of the United States

ALAN MACKERLEY,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

VOLUME II

PAUL MORRIS
Counsel of Record
9130 S. Dadeland Blvd.
Suite 1528
Miami, FL 33156
(305) 670-1441

Counsel for Petitioner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 06-14229-CIV-GRAHAM/LYNCH

ALAN MACKERLEY,

Petitioner,

v.

JAMES R. McDONOUGH, Sec'y Fla. Dept. of Corrections, AND CHARLIE CRIST, Atty. Gen., State of Florida,

Respondents.

_____/

REPORT AND RECOMMENDATION ON PETITIONER'S PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (DE 1)

THIS CAUSE comes before this Court upon an Order of Reference (DE 3) and the above Petition. Having reviewed the Petition, the Response, the Reply, their accompanying attachments, and the other pertinent portions of the record, this Court recommends as follows:

BACKGROUND

1. The Petitioner was charged with and ultimately convicted of murdering Frank Black. The Petitioner and Mr. Black were business competitors, and Mr. Black's increasing competitive edge and aggressive bidding were fueling the animosity between them. The scheme the Petitioner was alleged to have carried out began with the Petitioner's girlfriend, Lisa Costello, surreptitiously inviting Mr. Black to the Petitioner's home under the ruse of a business deal.

2. Several of Mr. Black's family members, business associates, co-workers, and friends provided background information about this business trip. This included the peculiar nature of Ms. Costello's inquiries, Mr. Black's custom of always staying in close contact with the office, and the many business meetings scheduled for his quick return. These personas also spoke of the personal animosity between the Petitioner and Mr. Black. Those closer to the Petitioner revealed that the Petitioner was growing angry with Mr. Black and that his financial situation was becoming increasingly strained.

3. Mr. Black's flight to West Palm Beach arrived in the late afternoon on Saturday, February 24, 1996, the day of the parties' scheduled meeting. Phone records from that day and the two days before show a flurry of calls between pay phones and Mr. Black. Records from Hertz Car Rental in West Palm Beach show that Lisa Nardiello (Ms. Costello) rented a car 20 minutes before Mr. Black's arrival. Earlier that day friends of theirs saw the Petitioner at Ms. Costello's apartment.

4. Ms. Costello picked Mr. Black up from the airport and brought him to the Petitioner's residence. What happened next comes from William Anderson's testimony: According to what the Petitioner had told him, the Petitioner shot Mr. Black in the foyer of his house. The Petitioner then wrapped Mr. Black's body, his personal possessions, the gun, and some weights up in plastic sheeting, and dumped it out at sea. The bundle floated back up, requiring the Petitioner to punch holes into the plastic. The Petitioner and an accomplice (then unnamed) removed the wall and carpeting from the area of the shooting, took the debris to the dump, and scrubbed the area of any forensic evidence. The accomplice then used Mr. Black's credit card in Miami to create a false trail.

5. There is circumstantial corroboration of this version of events. The Petitioner had used his credit card to buy a variety of cleaning solutions and tools as well as duct tape. The Petitioner called Robert Sanandajian, his son-in-law, to tell him that he was taking his boat out. Mr. Sanandajian testified further

that on February 26th, the Petitioner asked him to take sheet-rock, carpeting, vacuums, and other debris to the dump. The Petitioner's explanation for this request was that Mr. Black had visited him on the 24th and had subsequently went missing. The Petitioner wanted to remove any sign of Mr. Black's presence in order to avoid suspicion should the police investigate. The Petitioner also instructed Mr. Sanandajian to deliver $72,000.00 in cash to William Anderson for safekeeping.

6. Ms. Costello did not return home the night of the 24th. Early in the morning of Sunday, the 25th, Ms. Costello was seen asking the clerk at the Embassy Suites Hotel on Singer Island about room availability in South Beach. Records show that Mr. Black's credit card was used to place several calls from the Singer Island Hotel later that afternoon. On February 26th, Mr. Black was declared a missing person, and the New Jersey authorities initiated the criminal investigation the next day.

7. William Anderson was a central figure in the State's case against the Petitioner. The prosecution lacked any direct evidence of Mr. Black's presence at the Petitioner's home or even of the Petitioner's involvement in his death. The prosecution did not call Ms. Costello to the stand, and thus the prosecution relied mostly exclusively upon Mr. Anderson's uncorroborated testimony of the Petitioner's incriminating statements. At trial the Petitioner hotly contested Mr. Anderson's testimony, alleging bias due to Mr. Anderson's collection of a substantial reward, his anger over his wife's ten year affair with the Petitioner, and his desire to avoid any criminal liability of his own. The Petitioner also cast the other aspects of the alleged scheme, summarized in the paragraphs above, in an entirely different light and blamed Ms. Costello (and a dubious friend of hers) for Mr. Black's murder.

8. From the 26 through the 28 of February, the Petitioner called Mr. Anderson about his airplane's availability. On the 28th he asked Mr. Anderson to fly him over the ocean. When Mr. Anderson asked what he was looking for, the Petitioner told him what he had

done and explained that he wanted to look for Mr. Black's body. They decided that that would be impractical. A couple of months later, on April 20th, Mr. Anderson flew the Petitioner and Ms. Costello to New Jersey. It was during this flight when Mr. Anderson first learned of Ms. Costello's role as the accomplice. Moreover the Petitioner was showing no remorse, affirming his belief that Mr. Black had deserved it. At some point Mr. Anderson cajoled the Petitioner to leave the country.

9. It was not until May 30th when law enforcement first contacted Mr. Anderson. Twice Mr. Anderson denied knowing anything. Mr. Anderson would later explain that he feared criminal repercussions from knowing about the murder.

10. For months Mr. Anderson could not sleep, and in June 1996 he first sought legal counsel. That move precipitated Mr. Anderson's first meeting with law enforcement in August 1996. Presumably after agreeing to cooperate with law enforcement, Mr. Anderson discussed the predicament with the Petitioner. In the recorded conversation they agreed upon a story and a plan for handling the unfolding investigation.

11. In October 1997, a year after first seeking counsel, Mr. Anderson returned to his attorney very distressed. He claimed he just had learned of his wife's ten year affair with the Petitioner, and although law enforcement had made intimations of the affair earlier, it was only then that he knew for sure.

12. At dispute here is the wiretap that law enforcement placed on the Petitioner's phone, the circumstances of which were set out in the Petitioner's Motion to Suppress. On April 11, 1996 (45 days after Mr. Black's trip to Florida) law enforcement first applied for a wiretap on the Petitioner's home phone. The affidavit stated the agent's reasons for regarding the Petitioner and Ms. Costello as prime suspects, such as the information gleaned from the telephone and rental car records, the hotel clerk witness, the results of a pen register (which showed no calls to Mr. Anderson), and the parties' known animosity. The affidavit also listed the various shortcomings of the

investigation to-date, including law enforcement's lack of probable cause for a search warrant; its preference to avoid contacting the suspects directly, at least for the time being; and the unproductive wiretap on Ms. Costello's home phone. The Motion also briefly mentioned the agent's proffer of exhaustion and necessity.

13. That application was granted, and the State followed it up with several additional applications greatly expanding the scope of its eavesdropping on the Petitioner. On April 18th it sought a wiretap on the Petitioner's cell phone and listening devices in his kitchen and living room. This second application included additional investigatory findings gathered from the wiretap on the Petitioner's home phone (e.g., the Petitioner's conversations with Ms. Costello's roommate and with his attorney), on Ms. Costello's phone, and the fact that many of the Petitioner's calls were forwarded to his cell hone. On April 25th, the State applied to bug the Petitioner's master bedroom and porch. These applications were then extended for another month citing the failure to-date to intercept implicating conversations between the Petitioner and Ms. Costello. It appeared the suspects were being discreet.

14. In this way the focus and object of the State's electronic surveillance was the Petitioner and Ms. Costello. Still, the most fruitful yield of the eavesdropping was learning of Mr. Anderson. At least as early as May 2nd, the State had intercepted a suspicious conversation between the Petitioner and Mr. Anderson in which they planned to meet in order to discuss the airlines' reporting of Ms. Costello's air travel to the authorities. Evidently their conversations yielded little or no direct evidence of the Petitioner's role in Mr. Black's death, but in any event, the conversation alerted the State to Mr. Anderson's status as a close friend and confident of the Petitioner. These conversations led law enforcement to contact Mr. Anderson on May 30th.

15. As noted above, the Petitioner moved to suppress the wiretap evidence and importantly the fruit of the eavesdropping - - Mr. Anderson's testimony.

The Petitioner argued that both the State's lack of probable cause its failure to minimize the recorded conversations violated § 934.09(5), Fla. Stat. The Petitioner raised no argument, either express or implied, that the State neglected to exhaust more traditional investigatory means before seeking the wiretap. The trial court denied his motion without an opinion. After three jury trials, the Petitioner was eventually found guilty as charged. It was only on appeal, with this current counsel, did the Petitioner object to the State's failure to make the statutorily required showing of exhaustion and necessity for the wiretap. The State refuted the argument on both the issue's merits and on the Petitioner's failure to preserve the issue for appeal. There is no direct indication whether the Fourth District Court of Appeal actually considered the merits of this issue. In its opinion, it stated simply:

> As to the other issues raised by appellant, we conclude that there was probable cause for the wire tap and that the court did not err in denying the motion to suppress the evidence obtained from it.

16. This Court finds no need to hold a hearing in this case. The record contains all the relevant proceedings, and the legal issues are adequately briefed in the parties' pleadings. The record therefore provides ample basis for this Court to rule on the Petition. See Turner v. Crosby,339 F.3d 1247, 1274-75 (11th Cir. 2003).

DISCUSSION

The U.S. Supreme Court has "established a two-prong test for deciding whether a defendant has received ineffective assistance of counsel. The defendant must show (1) that counsel's performance failed to meet 'an objective standard of reasonableness,' and (2) that the defendant's rights were prejudiced as a result of the attorney's substandard performance." (internal citations omitted). Gomez-Diaz v. U.S., 433

F.3d 788, 791 (11th Cir. 2005) (citing the seminal case of Strickland v. Washington, 466 U.S. 668 (1984)). See also, Turner, 339 F.3d at 1275-76. The Petitioner therefore must demonstrate both professional error and a prejudicial effect on the proceedings, and the failure to demonstrate either is fatal to the claim.

With respect to the first prong - - the quality of the legal services - - the Petitioner must show that his counsel did more than just make a simple mistake; indeed, the lens of hindsight can reveal imperfections in even the most earnest effort or strategy. The Petitioner must show instead that the quality of his counsel's performance was so deficient that it fell "below the wide range of competence demanded of attorneys in criminal cases" and "undermined the proper functioning of the adversarial process." Strickland, 466 U.S. at 686-88. Otherwise counsel is "strongly presumed" to have rendered adequate assistance and to have exercised reasonable professional conduct is wide, and counsel's tactical decisions are accorded some benefit of the doubt. This presumption becomes stronger if counsel is experienced. See Chandler v. U.S., 218 F.3d 1305, 1316 (11th Cir. 2000). The above amounts to a highly deferential standard of review requiring Petitioner to meet a "heavy" burden of persuasion. See Fugate v. Head, 261 F.3d 1206, 1216 (11th Cir. 2001).

The second prong - - which concerns the effect of the deficient assistance - - tests the fairness and reliability of the underlying proceedings. The Petitioner must show a reasonable probability that the proceedings would have ended differently had his counsel not erred. In other words, prejudice occurs when counsel's error is so grievous, it calls the viability of the proceedings into doubt. See Butcher v. U.S., 368 F.3d 1290, 1294 (11th Cir. 2004).

This Court begins with the first prong and the nature and degree of the alleged attorney error. Here, the Petitioner contends that his attorney failed to raise a meritorious argument: that the State failed to exhaust less intrusive investigatory techniques and made an insufficient showing of necessity for the wiretap. Thus this Court will consider how the issue

would have been framed at the time the Petitioner pursued his Motion to Suppress.

Section 934.09, Fla. Sta. (1995) governed the State's application for the subject wiretap. Subsection (1)(b) thereof required the applying law enforcement officer to provide "[a] full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued." Important for instant purposes is subsection (1)(c) which required:

> A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.

Should the wiretap authorization prove unfounded, an aggrieved party may move under subsection (9)(a) to have "the contents of the intercepted wire, oral, or electronic communication, or evidence derived therefrom," suppressed. These portions of the statute have remained essentially the same.

The purpose of the "exhaustion" or "necessity" requirement, highlighted above, is to discourage the routine use of wiretaps, but this does not mean law enforcement must comprehensively exhaust all other investigatory alternatives first before seeking one. See State v. Weedon, 425 So. 2d 125, 127 (Fla. 4th DCA 1982), Sarno v. State, 424 So. 2d 829, 835 (Fla. 3rd DCA 1982). Nor may a wiretap order be invalidated on an after-the-fact suggestion that some other investigative technique might have been used but was not. See Hudson v. State, 368 So. 2d 899, 903 (Fla. 3rd DCA 1979) (quoting U.S. v. Hyde, 574 F.2d 856 (5th Cir. 1978)). Federal law similarly limits the proffer to a simple explanation of what shortcomings the "several investigative techniques that reasonably suggest themselves" presented. See U.S. v. Nixon, 918 F.2d 895, 901 (11th Cir. 1990) (citing U.S. v. Van Horn, 789 F.2d 1492 (11th Cir. 1986)). Judging the sufficiency of an application's statement of necessity - -like judging probable cause - - should be based on the entire

application and on a practical, common sense, a realistic review of all the facts and circumstances. See Daniels v. State, 381 So. 2d 707, 711-12 (Fla. 1st DCA 1979).

On April 11, 1996, Special Agent Michael Driscoll of the Fla. Dept. of Law Enforcement submitted the first wiretap application in the Black murder investigation. In 26 single-spaced pages, his application set forth the factual predicate for obtaining the wiretap on the Petitioner's home phone. In far greater detail than summarized above or even recounted in the Motion to Suppress, the application described the results of law enforcement's background investigation and why the Petitioner and Ms. Costello were under suspicion. Importantly, Paragraph 7 (broken down into subparagraphs (a) through (h)) presented law enforcement's "complete statement of the investigative procedures that have either been attempted or would probably fail." It thoroughly explained why each of the traditional investigatory means would be either counterproductive, e.g., approaching the suspects directly, or had been unproductive, e.g., the pen register. The application concluded "that electronic surveillance, through wire interception, is the only remaining effective alternative that can be used in obtaining essential evidence of the criminal violations being committed by the subjects listed below or other persons unknown who are also involved."

As one would expect, what constitutes a sufficient statement of exhaustion and necessity varies greatly on the specific facts of each individual investigation. If a common theme can be drawn from the case law, however, it might be that the applicant must proffer at least some meaningful statement on the topic. For example in the case of Bagley v. State, 397 So. 2d 1036 (Fla. 5th DCA 1981) law enforcement applied for a second wiretap based entirely on the first wiretap's application without any mention of the results of alternative measures. The application also failed to disclose the existence of the prior wiretap. Thus the wiretap application fell short of the statute's requirements. A proper proffer, however, need not be

exacting. Cf. State v. Howard, 666 So. 2d 592 (Fla. 4th DCA 1996) (holding that the trial court's standard of proof on law enforcement's search warrant application was too high).

This Court simply sees no real merit to the proposition that the State failed to show necessity for the wiretap. Rather, the agent's affidavit appears to exceed what is usually required. Nor does this Court see any exaggeration or overreaching in its explanation since the facts of this case reasonably support the State's position. The crime here was not comprised of an ongoing enterprise, such as a drug distribution ring, thereby giving law enforcement more investigatory options and more opportunities to employ them. Law enforcement instead was investigating a one-time, past act. With all the "background" investigation exhausted and with the prime suspects remaining evasive, law enforcement had few alternatives left to pursue and risked tipping its hand.

Regardless of the strength of the omitted argument or the likelihood of the Petitioner prevailing on it, the more important inquiry here comes from Strickland. Dispositive to resolving the Petition is whether its exclusion from the Motion to Suppress fell so far below the expected norm as to effectively deprive the Petitioner of his constitutional right to effective representation. It should be noted that the Petitioner does not claim lack of preparation, mistaken assumptions, or simple default (e.g., by pursing no suppression motion at all). Compare Kimmelman v. Morrison, 477 U.S. 365 (1986).

The Petition is premised instead on trial counsel's failure to raise this one particular argument, but his Court cannot conclude that they neglected to explore all possible avenues of relief. When counsel moved to suppress the wiretap evidence, they did so expressly under the provisions of § 934.09, Fla. Stat. The motion recalled all the various aspects of the wiretap application, including the necessity requirement, and acknowledged the most damaging result of the wiretap investigation: learning of Mr. Anderson. It fails to reason that after exploring the full breadth of the wiretap, trial counsel (all three of

them who signed the Motion to Suppress) simply overlooked or omitted this one argument. Indeed if there was any error in the Motion to Suppress, it must be counsel's description of the agent's necessity proffer, dismissively stating, "The affidavit went on to assert in general terms that other investigative procedures would probably fail, including Grand Jury or State Attorney Subpoena, surveillance, confidential informants, undercover activities, and pen registers." (emphasis added). Not only does this description appear to contradict itself somewhat, but it ignores the extent of the proffer's detail. Trial counsel's intent may have been instead to highlight the lack of incriminating evidence in order to emphasize the lack of probable cause. In this way, the exhaustion/necessity element of the wiretap application still came into play, just in a different context. It even might have been inconsistent for counsel to have argued both that the investigation had been unproductive (and hence no probable cause) and that the wiretap was unnecessary.

The Petitioner now places much emphasis on the agent's assertion, made at the suppression hearing, of law enforcement's ability to have found Mr. Anderson without the wiretap. The Petitioner does not indicate in which context the agent offered this explanation, but it does little to controvert the foregoing. The fact remains that the wiretap application proferred a very detailed explanation regarding the unsatisfactory state of the investigation to-date and why a wiretap was the necessary next step. Whether it was within the real of possibilities that law enforcement could have discovered Mr. Anderson is not the test; whether the agent knowing what he knows now could have discovered Mr. Anderson in hindsight is certainly not the test. Lastly, this Court notes that searching for witnesses or others in the know was never the object of the wiretap, and hence the application's sufficiency should not be adjudged solely against Mr. Anderson's situation. The clear object of the wiretap application was to elicit incriminating statements from the Petitioner or Ms. Costello. Learning of Mr. Anderson's status as the Petitioner's friend and confidant and

making use of that information in the furtherance of the criminal investigation happened to be a consequence of the wiretap. So long as the wiretap, itself, was proper, its fruit should be properly admissible in trial.

It is important to remember that the matter of the wiretap was vetted several times over the course of the criminal proceedings. It was subject to a thorough application, a thorough Motion to Suppress and hearing thereon, and was briefed to the State appellate court. It is also important to note that the challenges the Petitioner raised in his Motion to Suppress, especially the lack of probable cause, are not entirely apart and distinct from the exhaustion and necessity issue. To a certain extent, both issues feed into one another and both issues concern whether law enforcement stated good reason for seeking a wiretap. This Court sees no error in trial counsel's use of their professional judgment and discretion to limit the legal arguments to the more salient points rather than raising every argument theoretically possible. But even if the omission of the necessity argument was not the product of a strategic consideration, the matter still remained germane to the proceedings before the State Court. This Court is confident that the propriety of the wiretap authorization was reviewed adequately and sufficiently to ensure the fairness of the proceedings.

CONCLUSION

Having read the full Paragraph 7 of the first wiretap application, this Court sees no real question of exhaustion or necessity that trial counsel could have raised in good faith. Moreover, the overall circumstances of the nature of the crime and investigation and the extent to which the wiretap application was challenged all undermine the Petitioner's present contentions. This Court therefore concludes that his trial counsel's representation more than satisfied the Sixth Amendment minimum. Having found no attorney error, there can be no undue prejudice resulting therefrom.

ACCORDINGLY, the Petitioner's Petition for Writ of Habeas Corpus should be **DENIED**,

The parties shall have ten (10) days from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Donald L. Graham, the United States District Judge assigned to this case.

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 24th day of January, 2007.

FRANK J. LYNCH, JR.
UNITED STATES
MAGISTRATE JUDGE

cc: Hon. Donald L. Graham
Paul Morris, Esq.
Melynda L. Melear, AAG

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FT. PIERCE DIVISION

Case No. 06-14229-CIV-GRAHAM/LYNCH

ALAN MACKERLEY,

Petitioner,

v.

JAMES R. McDONOUGH,

Respondent.

_____/

ORDER

THIS CAUSE came before the Court upon Petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [D.E. 1].

THIS MATTER was referred to the Honorable United States Magistrate Judge Frank J. Lynch pursuant to 28 U.S.C. §626 by this Court's Order [D.E. 3]. The Magistrate Judge has issued a Report and Recommendation recommending that the Petition be denied [D.E. 13]. The Petitioner has filed Objections to the Magistrate's Report [D.E. 16].

THE COURT has conducted a de novo review of the file and is otherwise fully advised in the premises.

I. BACKGROUND

The Petitioner filed the instant 28 U.S.C. § 2254 Petition asserting that he was denied effective assistance of counsel at his murder trial.[13] Petitioner maintains that his trial attorney failed to raise and preserve for appeal the issues of necessity and exhaustion regarding a wiretap order issued pursuant to Florida Statute 934.09(1) and its federal counterpart 18 U.S.C. 2518(1)(c).[14]

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[13] The underlying facts of the murder and investigation have been set forth at length in the Magistrate's Report and Recommendation. Accordingly, the Court will not restate those facts herein.

[14] Florida Statute 934.09, which tracks 18 U.S.C. § 2518, provides in relevant part,

> (1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under ss. 934.03-934.09 shall be made in writing upon oath or affirmation...Each application shall include the following information:
>
> ...
>
> (c) A full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.
>
> (3) Upon such application, the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications...if the judge determines on the basis of the facts submitted by the applicant that:

The Magistrate Judge in this matter issued a Report and Recommendation finding that there was no issue of necessity or exhaustion that trial counsel could have raised in good faith [D.E. 13]. The Petitioner has submitted Objections to the Magistrate's Report wherein the Petitioner addresses both the Report of the Magistrate and the arguments raised in the Government's Opposition to the Petition for Writ of Habeas Corpus. The Court will address each of Petitioner's arguments in turn.

II. LAW & DISCUSSION

A. Objections to Magistrate's Report and Recommendation

Petitioner raises the following objections to the Magistrate Judge's Report and Recommendation: 1) that the Magistrate failed to properly take into account the testimony of Agent Driscoll at the suppression hearing which indicated that there was no necessity for the wiretap; 2) that the Magistrate failed to acknowledge the Government's concession that the authorities did not pursue and exhaust traditional law enforcement investigatory techniques prior to obtaining the wire tap; and 3) that the Magistrate's suggestion that trial counsel's failure to raise the

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...

> (c) Normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.

necessity requirement was strategic, was speculative and required an evidentiary hearing.

1) Testimony of Agent Driscoll at the Suppression Hearing

Petitioner first asserts that the Magistrate Judge failed to take into account the testimony of Agent Driscoll as the suppression hearing which, according to Petitioner, indicated that there was no necessity for the wire tap. This Court has reviewed the transcript from the suppression hearing and disagrees with the Petitioner's assessment of Agent Driscoll's testimony [See D.E. 7-8].

Defendant argues that Agent Driscoll's statement that the key witness in the case, Mr. Anderson, would have inevitably been discovered through normal investigative procedures proves that the necessity requirement of the wiretap statute was violated. However, the fact that Mr. Anderson may have eventually been found through other avenues does not demonstrate that other investigative means had not been sufficiently tried and failed for purposes of satisfying the necessity requirement. Rather, as stated by the court in Hudson v. State, 368 So. 2d. 899 (Fla.3d DCA 1979), the wiretap necessity "...requirement is intended to ensure that wiretap authorization procedures [are] not to be routinely employed as the initial step in criminal investigation; however, it is not necessary to show a comprehensive exhaustion of all possible techniques." Hudson, 368 So. 2d at 902-903. (citing U.S. v. Giordano, 416 U.S. 505, 94 S.Ct. 1820 (1974)). Further, "...courts will not invalidate a wiretap order simply because defense lawyers are able to suggest post factum some investigative technique that might have been used and

was not." Id. (citing United States v. Hyde, 574 F.2d 856, 867 (5th Cir. 1978) (emphasis added). Finally, the determination of when the necessity requirement is satisfied must be made against flexible standards, and each case must be examined on its own facts. Hyde, 574 F. 2d at 867.

By all accounts, the wiretaps in this case were issued based upon the application submitted by the Government after the Government had obtained a court order to install a PEN Register on the Petitioner's telephone. The application addressed the necessity issue by methodically explaining that the use of confidential informants, undercover activities and continued surveillance would not be fruitful. In addition, as noted by Defense counsel in the suppression hearing, the application stated that "...[t]he use of PEN Register alone will not measurably further the investigation." [D.E. 7-8, at 30]. Further, the application also noted that as PEN Registers only capture numbers called and do not record the identity of the parties or substance of conversations, the PEN Registers only capture numbers called and do not record the identity of the parties or substance of conversations, the PEN Registers could not provide "...evidence to specifically identify the co-conspirators or the nature and scope of the illegal scheme." [D.E. 7-7]. Hence, at the time of the suppression hearing, Defense counsel appropriately did not challenge the sufficiency of the necessity of the wiretaps as there was nothing in the record to support the conclusion that the Government had not satisfied this requirement. See e.g. Jones v. U.S., 224 F.3d 1251, 1257 (11th Cir. 2000) (stating since district court would be required to follow the law of this circuit...it was not completely unreasonable for counsel to make a strategic decision

to forego a claim that was a loser under the then-current state of the law).

Second, Defendant's argument that trial counsel should have asserted a violation of the necessity requirement after the testimony of Agent Driscoll at the suppression hearing fails to take into account the context of the Agent's testimony. From the beginning of the suppression hearing, Defendant's trial counsel argued that probable cause was lacking for the wiretap as there had been no evidence introduced to link the Defendant to the homicide prior to the issue of the wiretap [See D.E. 7-8 at 13 17]. Trial counsel also argued that there was no evidence to suggest that the Defendant's telephone was going to be used in connection with any activities related to the homicide. [D.E. 7-8 at 13]. Further, trial counsel asserted that the information relied upon in order to secure the wiretaps was stale as significant time had elapsed between the time of the homicide and the requested wiretaps. [See D.E. 7-8 at 18-19].

In response to the Defendant's arguments, the Government argued that even if the wiretaps were not supported by probable cause and therefore illegal, the doctrine of inevitable discovery would prevent the court from suppressing certain evidence, including evidence obtained from the key witness, Mr. Anderson. To dispute this claim, Defense counsel introduced the deposition testimony of Agent Michael Driscoll wherein the Agent testified that Mr. Anderson was found through the wiretaps. [D.E. 7-8 at 26]. Trial counsel then stated that there was additional evidence which showed "....the tires were used in fact to identify Anderson." Defense counsel argued that it was unlikely that the telephone toll records would show long distance calls to Mr. Anderson and that Mr.

Anderson's number did not show upon the reverse edits from the Defendant's telephone.

The Government then called Agent Driscoll to the stand to rebut Defense counsel's arguments. Agent Driscoll testified about the preparation of the wiretap application and testified that the Government had first subpoenaed the Defendant's telephone records based upon information gathered through the reverse edit. The Agent further testified that the Government then applied for a PEN register but acknowledged that PEN registers do not record telephone conversations. According to the Agent, the Government then drafted a twenty-eight page application seeking a wiretap and submitted it to the appropriate courts. The Agent further testified that through normal investigative techniques the government would have inevitably discovered and interviewed Mr. Anderson.

Defense counsel then cross-examined Agent Driscoll. During the cross-examination, Agent Driscoll again conceded that Mr. Anderson was discovered through the wiretap. Agent Driscoll also agreed that based upon the wiretap, he decided to interview Mr. Anderson. The Agent however maintained that the agents would have discovered Mr. Anderson through normal surveillance techniques because of long distance calls that the Defendant made to a hotel where Mr. Anderson was staying. Defense counsel then questioned the Agent about the difficulties associated with finding a specific person at a hotel based upon telephone calls made to the general hotel number. The Agent admitted that if the hotel had a thousand people, that the review of the records would have taken some time.

Thus, the focus of the suppression hearing was whether there was probable cause to support a wiretap order and, if not, whether all of the evidence gathered

based upon the wiretaps, including Mr. Anderson's testimony, should have been excluded. Defendant's counsel therefore logically argued that Mr. Anderson was discovered only through the use of the wiretaps. As such, Petitioner's assertion that Defense trial counsel should have changed its position at the hearing and argued that the wiretaps were not necessary in order to discover Mr. Anderson seems illogical. Further, as discovered above, the Court does not find that Agent Driscoll's testimony alone would support a finding that the necessity requirement was not met in this case. Thus, Petitioner's argument on this issue is without merit.

The Petitioner relies on Jones v. U.S., 224 F. 3d 1251 (11th Cir. 2000) for support of its position that the trial counsel's performance was deficient as counsel failed to seek suppression based upon a violation of the necessity requirement. The Eleventh Circuit holding in Jones, however, is distinguishable from the case at bar. In that case, based upon a then-recent ruling by the Supreme Court, there was no question that the government's failure, to timely seal wiretap tapes, without satisfactory explanation for the failure, was a clear violation of the statute which required suppression of the evidence. Id. at 1258. In contrast, in this case, as discussed above, there is no seeming nor actual violation of the necessity requirement based upon Agent Driscoll's testimony.

In addition, Petitioner has improperly focused on whether the necessity requirement was satisfied vis-a-vis Mr. Anderson and not the general investigation involving the Defendant. In other words, in hindsight, the fact that one witness may have been found through other means, does not render the wiretap unnecessary as it pertains to the Defendant, generally.

2) Government's Concession that the Authorities did not Pursue and Exhaust Traditional Law Enforcement Investigatory Techniques prior to Obtaining the Wire Tap

The Petitioner next argues that the Magistrate failed to acknowledge the state's concession that the authorities did not pursue and exhaust traditional investigatory techniques. The Petitioner points to statements allegedly contained in the State's Appellate Brief for support of this contention. However, the State does not concede in its Brief that other investigatory techniques were not pursued. On the contrary, in the Brief, the State argued that the necessity requirement had been met and reiterated the investigation efforts made by the authorities, as described in the application for the wiretap. In addition, as discussed above, the Government need not exhaust all investigative techniques before satisfying the necessity requirement of the wiretap statute. Finally, the fact that the State argued that Mr. Anderson would have inevitably been discovered does not mean, and is certainly not a concession, that the necessity requirement of the wiretap statute was not met.

3) Failure to Hold Evidentiary Hearing

Petitioner next argues that the Magistrate Judge should have held an evidentiary hearing prior to concluding that trial counsel's failure to assert a necessity requirement violation may have been a strategic decision. A district court need not hold an evidentiary hearing on an ineffective assistance of counsel claim if it can be conclusively determined from the record that petitioner was not denied effective

assistance of counsel. See Smith v. Singletary, 170 F. 3d 1051, 1054 (11th Cir. 1999) (citation omitted). In this matter, it is clear from the record that the Defendant was not denied effective assistance of counsel based upon the failure to raise the necessity defense, whether such a decision was strategic or not. In addition, the record on the necessity issue is extensive given that this issue was briefed thoroughly during the state appellate and post conviction proceedings. Therefore, an evidentiary hearing was not necessary.

B. Petitioner's Response to Respondent's Opposition

The Petitioner also raises arguments directed at the Respondent's Opposition to the Defendant's Petition. The Petitioner raises three arguments: 1) the Fourth District did not reach the merits of the necessity violation as the issue was not preserved for appeal; 2) a violation of the wiretap status requires the mandatory exclusion of the testimony of Mr. Anderson; and, 3) that the exception for exclusion of witness testimony as enunciated by the Supreme Court in U.S. v. Ceccolini, 435 U.S. 268 (1978) does not apply to the case at bar.

For the following reasons, the Court finds the Petitioner's arguments are without merit. First, as noted by the Circuit Court in its denial of the Defendant's Motion for Post-Conviction Relief, the issues raised regarding ineffective assistance of counsel related to the wiretap necessity requirement were raised on direct appeal to the Fourth District. Further, and more importantly for purposes of the instant Petition, the Court does not find that the necessity requirement of the wiretap statute was

violated and therefore the Court is unable to conclude that trial counsel's performance fell beneath an objective standard of reasonableness or that the Defendant was prejudiced by trial counsel's performance. See, Strickland v. Washington, 466 U.S. 668 (1984). Hence, the Petitioner is unable to meet his burden under Strickland, irrespective of whether the Fourth District reached the issue.

Second, as discussed at length above, the Court finds that Mr. Anderson's testimony does not support the conclusion that a violation of the wiretap statute occurred. Accordingly, there is no basis to suppress any of the evidence obtained through the wiretaps, including Mr. Anderson's testimony.

Finally, the Court need not reach the issue of whether the Supreme Court's holding in Ceccolini should be applied to the instant case, as the Court does not find that a violation of the wiretap statute occurred.

III. CONCLUSION

Accordingly, based on the foregoing, it is

ORDERED AND ADJUDGED that Petitioner's Objections are overruled and United States Magistrate Judge Lynch's Report and Recommendation [D.E. 14) is hereby APPROVED to the extent that is consistent with this Order. It is further

ORDERED AND ADJUDGED that Petitioner Alan Mackerley's Petition for Writ of Habeas Corpus Pursuant to Title 28 U.S.C. § 2254 is **DENIED** [D.E. 1]. It is further

ORDERED AND ADJUGED that this case is **CLOSED** and any pending motions are denied as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 13th day of August, 2007.

DONALD L. GRAHAM
UNITED STATES DISTRICT JUDGE

cc: U.S. Magistrate Frank J. Lynch
Counsel of Record